Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

AGNES KEMPKER-CLOYD,

Petitioners,

versus

JANET RENO,
Attorney General of the United States,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [redacted] CIRCUIT

Sixth

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether The Decisions of the Lower Courts Allow Federal Managers to Sexually Harass and Retaliate Against Their Subordinates as Long as They Wait 45 Days Between Each Incident.

II. Whether The Denial of Parking Issue Coupled with the Denial of Letters of Commendations and Reprimand Are Sufficient "Adverse Actions" to Support a Claim of Retaliation.

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Petitioner, Agnes Kempker-Cloyd, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals is referenced in a "Table of Decisions Without Reported Opinions" appearing at 198 F.3d 246. The unreported Court of Appeals opinion is reproduced in the Appendix ("App.") filed herewith at 1a. The unreported decision of the District Court is reproduced at App. B at 4a. The Order of the Court of Appeals denying a petition for rehearing *en banc* is reproduced at App. C at 29a. The pertinent portions of the transcript of Oral Argument and the July 27, 1998 Bench Opinion of the District Court are reproduced at App. D at 30a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on November 22, 1999. Rehearing *en banc* was denied on February 25, 2000. The Court of Appeals mandate issued on March 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

STATUTES INVOLVED

The pertinent provisions of Title VII of the Civil Rights Act of 1964, as amended, and implementing regulation are set forth below:

42 U.S.C. § 2000e-16:

(a) Discriminatory practices prohibited;

employees or applicants for employment subject to coverage.

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers, issuance of rules, regulations, etc.; ....

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry

out its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

* * * * *

29 C.F.R. § 1614.105 (1998):.

§ 1614.105 Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.

* * * * *

STATEMENT OF THE CASE

Petitioner is a female Assistant United States Attorney (AUSA) who has worked in the Office of the U.S. Attorney for the Western District of Michigan for 22 years.

Following the appointment of the most recent incumbent, Michael Dettmer, petitioner and other women in the office testified that they were subjected to harassment of all kinds from Mr. Dettmer, including sexual suggestions and invitations, and threats of physical violence when a female subordinate was perceived as defying Mr. Dettmer.

Dettmer's actions included making sexually charged comments calculated to make Ms. Kempker-Cloyd uncomfortable, propositioning Ms. Kempker-Cloyd for sexual favors, "crowding" her after an office (Civil Division) function at a local restaurant, threatening to "take" her and physically touching her on the buttocks outside a Courthouse elevator. Dettmer's campaign of harassment against Ms. Kempker-Cloyd also included repeatedly asking her -- as well as other female AUSAs in the office -- to pick him up "for breakfast" and his then apparently basing his on-the-job treatment of these female government trial lawyers on whether or not they would comply with these improper and sexually charged requests. Later, after Ms. Kempker-Cloyd had rebuffed Mr. Dettmer's advances and confronted him for touching her buttocks, Dettmer sought to punish her by depriving her of the free office parking space that for years had been a benefit of her employment and by again "crowding" her in an office stairwell in the Grand Rapids U.S. Attorney's office space.

Ms. Kempker-Cloyd reasonably sought to resolve Mr. Dettmer's harassment without notifying the Equal Employment Opportunity (EEO) office. On December 6, 1994, she confronted Dettmer in the presence of then-First Assistant U.S. Attorney Thomas Gezon and Dan LaVille, the Civil Division Chief. At that meeting, Ms. Kempker-Cloyd told Mr. Dettmer that his conduct was sex discrimination and harassment and that she would make an EEO complaint if he continued this objectionable behavior. Dettmer agreed to make a "fresh start."

Following Ms. Kempker-Cloyd's strong rebuke at the

December 6, 1994 meeting, Dettmer's inappropriate behavior toward Ms. Kempker-Cloyd abated for a time. Unfortunately, by April or May 1995, this short-lived hiatus had ended. Dettmer's recidivism began with an attempt to punish her by stripping her of a free parking space at work. Dettmer quickly escalated to more direct sexually harassing conduct by closely following her up a vacant stairwell as she was carrying boxes into what was the then-new office space for the U.S. Attorney's office in the Law Building in Grand Rapids.

From May 4, 1995 through August 8, 1995, Dettmer abolished the seniority system for awarding excess parking spaces, and the management of the office specifically selected those who could use this free parking benefit during that period of time. As a result, Ms. Kempker-Cloyd, who had the most seniority was denied this benefit during this period.

Just as the parking manipulation was getting under way in April-May of 1995, Mr. Dettmer returned to physically "crowding" Ms. Kempker-Cloyd, and did so in a particularly sexual way. This occurred while Ms. Kempker-Cloyd was on her way up the internal stairs in the just-opened U.S. Attorney's Office space in the Law Building carrying some of her personal office material. Ms. Kempker-Cloyd recalls the event vividly: Dettmer was right behind her as she walked up the stairwell while carrying a box -- he was right on her like her shadow. She asked him to please pass her but he ignored the request and stayed abnormally closely behind her all the way up the stair and down the hall. When she ducked into the copy room to break away from him, he snidely commented "leaving so soon."

Coming as it did just as Dettmer was manipulating the free parking spaces to her specific detriment, the stairwell "crowding" had a devastating effect on Ms. Kempker-Cloyd. Dettmer's conduct drove home the point that Ms. Kempker-Cloyd was helpless when it came to dealing with Dettmer.

As he had bragged, Dettmer was a Presidential appointee who had nearly absolute control over her professional life. And he was willing to use his power against her. Indeed, the record reveals that in August 1995, while Dettmer failed in an attempt to have Ms. Kempker-Cloyd fired, there was no one to stop him from reprimanding her and depriving her of commendations that she would have otherwise received. Dettmer had also made clear that he was bigger and stronger than her and that when he chose to exploit that advantage, there was nothing she could do about it. *See* App. at 39a. This shattered Ms. Kempker-Cloyd's conviction that she could exercised some control over her situation by responding to Dettmer in an assertive and competent manner. The situation had become intolerable.

It was in desperation that Ms. Kempker-Cloyd then turned to the EEO process. After seeking EEO counseling following the incidents in May 1995, which failed to resolve the issues, she ultimately filed a formal administrative EEO complaint on August 8, 1995. During the EEO administrative process, and at the EEO counselor's request, Ms. Kempker-Cloyd detailed the long history of Dettmer's sexual harassment and discrimination campaign against her in a nine-page faxed memo to the EEO counsel on June 19, 1995.

REASONS FOR GRANTING THE WRIT

I. The Decisions of the Lower Courts Allow Federal Managers to Sexually Harass and Retaliate Against Their Subordinates as Long as They Wait 45 Days Between Each Incident.

Sexual harassment is prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) as a form of gender discrimination. *See Meritor Savs. Bank v. Vinson*,

477 U.S. 57, 64-67 (1986) (holding "that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment"). A plaintiff can prevail on a hostile work environment sexual harassment claim if she establishes that the harassment was sufficiently severe or pervasive to alter the conditions of employment and create a hostile work environment. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Ms. Kempker-Cloyd satisfied this requirement by presenting evidence that Dettmer harassed her by a series of actions which escalated from sexual innuendo and overtures, to physical crowding, threats and, ultimately, a physical assault in late 1994. The district court confirmed this fact:

> ... a reasonable jury could find that prior to December 6, 1994, plaintiff was the target of sexual harassment by Dettmer.

App. at 5a, 40a. Further, the district court recognized that, seen in the context of the harassment in and before December 1994, the May 1995 stairwell incident amounted to sexual harassment:

> I find that there would be sufficient evidence to go to the jury as far as the harassment goes up until December, 1994 and then that the event that occurred on the stairwell in May of 1995 also gives rise to a potential claim, considering -- taking that statement again and the Greek sex thing and "Will you visit me in jail" after that statement could even cast, it seems to me, a light on the event that occurred in May of 1995 to include that as part of the same sexual harassment that occurred in 1994.

App. at 40a-41a. Nevertheless, the district court granted summary judgment accepting the following chain of government contentions: that Ms. Kempker-Cloyd had sufficient reason to file an EEO complaint as of December

1994, *See* App. at 13a-16a; that as result of her failure to do so, harassment occurring in 1994 was time-barred, *see id.*; and that the May 1995 actions, standing by themselves were insufficient bases for her claims of discrimination and retaliation, *see id.* at 16a-21a.

In affirming this decision, the Court of Appeals created a situation where a federal manager may commit serial acts of sexual harassment with impunity as long as he allows 45 days to elapse between each act because, as the district court stated in this case, isolated acts of harassment short of sexual assault are not enough to permit a claim for hostile work environment sexual harassment. *See* App. at 34a-38-a. By allowing this practice, the Court of Appeals departs from established precedent that allows an employee to base a cause of action on a series of discriminatory acts when, as was the case in the U.S. Attorney's Office for the Western District of Michigan, the acts are part of a continuing course of discrimination, harassment and retaliation.

A. The Continuing Pattern of Discrimination Theory Should Extend to Federal Employees Harassed by their Supervisor.

Regulations promulgated by the Equal Employment Opportunity Commission (EEOC) require that in order to challenge discriminatory actions, a Federal employee must contact the EEO counselor within 45 days of the alleged discrimination. 29 C.F.R. § 1613.214(a)(1). However, this Court has established that a timely charge filing requirement is not a jurisdictional prerequisite to suit in district court, but operates "like a statute of limitations, [which] is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392 (1982). Thus, charges can relate back to acts which occurred more than 45

days before the employee went to the EEO counselor under the "continuing violation" theory. *See United Airlines, Inc. v. Evans*, 431 U.S. 553, 558 (1977); *Milton v. Weinberger*, 645 F.2d 1070, 1074-77 (D.C.Cir.1981); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 473 (D.C.Cir.1976), *cert. denied*, 434 U.S. 1086 (1978). To establish a continuing violation, the employee must show "a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the (limitations) period." *Valentino v. U. S. Postal Serv., District*, 511 F.Supp. 917, 950 (D.D.C. 1981), *affirmed*, 674 F.2d 56 (D.C.Cir. 1982) (citing B. Schlei & P. Grossman, *Employment Discrimination Law* 232 (Supp. 1979)).

In *Berry v. Board of Supervisors*, 715 F.2d 971, 981 (5th Cir. 1983), the Fifth Circuit Court of Appeals identified three factors relevant for determining whether discriminatory conduct should be viewed as part of a continuing pattern:[1]

> (1) Subject matter -- whether the alleged discrimination involved the same basis (*e.g.* gender discrimination) and issue (*e.g.* sexual harassment). *See id.*
>
> (2) Frequency -- whether the incidents were isolated or recurring events. *See id.*
>
> (3) Permanency -- whether the earlier act had sufficient permanency to trigger the employee's awareness of and duty to challenge the alleged violation. *See id.*

An application of these criteria to the facts surrounding Ms. Kempker-Cloyd's employment demonstrates that the harassment visited upon her by Dettmer was a continuing

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[1]The court in *Berry* made clear that these factors should not be considered the exclusive basis for conducting the analysis. 715 F.2d at 981.

violation. First, there was only one basis of discrimination -- gender, and only one issue *involved* -- sexual harassment. Ultimately, the manner in which the harassment was perpetrated -- swaggering conduct by a physically intimidating male supervisor calculated to dominate his female subordinate -- was remarkably consistent.

Second, this case does not involve isolated incidents. As the district court noted, the evidence supported a conclusion that Ms. Kempker-Cloyd was a target of sexual harassment and that the stairway incident was "part of the same sexual harassment that occurred in 1994." App. B at 5, App. at 41a.

Finally, before Dettmer moved to deprive her of her parking space none of his actions had resulted in any sort of tangible or permanent impact. It was not as if she had been deprived of pay by a suspension or denial of a promotion. Thus, even after the physical assault late in 1994, when Ms. Kempker-Cloyd confronted Dettmer in the presence of witnesses and made clear that she would tolerate no more, she continued to reasonably hold out hope that Dettmer would leave her alone and allow her to work in peace. Thus, as in most sexual harassment cases, Ms. Kempker-Cloyd's situation involved a continuing violation of the law.

The district court's conclusion that Dettmer's crowding of Ms. Kempker-Cloyd in the stairway did not provide a basis for a finding of discrimination and retaliation contradicts its own findings. In this regard, the district court found that there was "sufficient evidence to go to the jury as far as the harassment goes up until December, 1994," *See* App. at 40a, and that, considering Dettmer's prior conduct, a jury could conclude that the stairwell event that occurred in May of 1995 was "part of the same sexual harassment that occurred in 1994." App. at 41a. Unfortunately, the district court decided that since it had concluded that Ms. Kempker-Cloyd was untimely in raising complaints about the earlier

misconduct, the 1994 harassment was, as a matter of law, disconnected from the May 1995 stairwell crowding incident. The district court therefore ignored evidence involving the 1994 harassment even in assessing the May 1995 crowding incident.[2] However, there is absolutely no authority to support such an approach. Even courts which have refused to find continuing violations, have allowed such evidence to be considered as relevant background material. *See e.g., United Air Lines Inc. v. Evans*, 431 U.S. 553, 558 (1977) ("A discriminatory act which is not made the basis for a timely charge ... may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue."); *Stroud v. Delta Airlines, Inc.*, 392 F. Supp. 1184 (N.D. Ga. 1975)(holding that evidence of past discriminatory action is admissible to show present discriminatory intent), *aff'd*, 544 F.2d 892, (5th Cir.), *cert. denied*, 434 U.S. 844 (1977); *Gore v. R.H. Macy & Co.*, 48 FEP 919, 920 (S.D.N.Y. 1988)(explaining that where

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[2]In fact, the district court went a step beyond ignoring relevant evidence when it denied Ms. Kempker-Cloyd the benefit of inferences which would have flown from such evidence, and when it bent over backwards to see this incident in a light least favorable to Ms. Kempker-Cloyd and most favorable to the alleged harasser. Thus, the district court stated "[c]rowding can be just as offensive to American men as to women" and speculated that perhaps "Dettmer was . . . simply being polite when he did not pass Plaintiff on the stairwell." JA-(Op.23-24). While Dettmer would most likely make such arguments if he were not disclaiming any memory of the incident, it was not for the district court in reviewing the case on a motion for summary judgment to infer that Ms. Kempker-Cloyd was not offended when she says that she was or that Dettmer was simply being polite when she says it was clear from the circumstances that he was deliberately making her uncomfortable. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986)(stating that in making a determination on a motion for summary judgment, the court must accept all of the evidence before it in a light most favorable to the party opposing summary judgment); *accord Michigan Protection and Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 341 (6th Cir. 1994).

termination was within the statutory period; earlier alleged acts were evidence of "discriminatory history" leading up to termination); *Gill v. Monroe County Dep't of Social Servs.*, 79 F.R.D. 316, 331 (W.D.N.Y. 1978)(stating that while only acts within the statutory period can be remedied, allegations of other discriminatory acts outside the charging period are admissible to prove an "ongoing pattern of discrimination"). Accordingly, even if Ms. Kempker-Cloyd were deemed to be time-barred with regard to the 1994 harassment, the district court erred ruling that it was required to turn a blind eye to that conduct when evaluating the May 1995 crowding incident.

B. Where, After being Confronted by the Harassed Employee, a Federal Manager Promises to Refrain from Future Acts, but Resumes Sexual Harassment and Retaliation After a 45-day Hiatus, the Harassed Employee Must be Allowed to Include the Prior Acts of Harassment In her Discrimination Complaint.

In a sexual harassment case, where the basis of the claim is a series of actions rather than a discrete personnel action such as denial of a promotion or a disciplinary action, it is well established that there is no basis for dismissing the entire claim where at least one incident occurred during the period allowed for filing the complaint. *See* 2 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law,* 1353-54 (3d ed. 1996)(citing *Abrams v. Baylor College of Medicine*, 805 F. 2d 528 (5th Cir. 1986)).

The district court relied heavily on *Galloway v. GMC Serv. Parts Operations*, 78 F.3d 1164 (7th. Cir. 1996) and correctly observee that under *Galloway* "[a] target employee's failure to file a timely complaint of discrimination does not

give the employer a license to continue the harassment beyond the time a victim is first aware of her claim." App. B at 19a (citing *Galloway*, 78 F.3d at 1167). However, having gleaned this teaching from *Galloway,* the district court inexplicably failed recognize its implications with respect to Ms. Kempker-Cloyd's situation. Thus, the court crafted a rule which, at best, would require Ms. Kempker-Cloyd to have endured another year of harassment and abuse before her sexual harassment claim would again ripen. Indeed, the district court granted much more than a mere "license" to sexual harassers. Rather, it granted *carte blanche* to a federal manager who spaces his acts of harassment to once every 45 days for each female on his staff.

In *Conlin v. Blanchard,* 890 F.2d 811, 815 (6th Cir. 1989), the court recognized an objective standard, whereby a claim would not be time-barred until there were sufficient facts to have caused a reasonable person to have filed a complaint. Applying a reasonable person test to the facts of Ms. Kempker-Cloyd's situation, the question becomes: "Should a reasonable Assistant United States Attorney, who had confronted her boss, the United States Attorney, be barred from raising earlier acts of harassment because she relied upon his promise that he will refrain from future acts of harassment?" Petitioner submits that the answer to that question has to be "No." In any case, Ms. Kempker-Cloyd's reasonable reliance on Dettmer's promise that he would refrain from future harassment, provides a basis for tolling the application of any time limits to bar her claim. *See EEOC v. Kentucky State Police Dep't*, 80 F.3d 1086, 1095 (6th Cir. 1996) (stating that equitable estoppel occurs when the employer takes active steps to delay employee's filing of a claim) (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 (1991)), *see also Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 928 (D.C. Cir. 1975)(limitation period tolled where employer actively causes employee to delay filing

claim).

The problem with the district court's analysis, which the Court of Appeals has refused to address, is the manner in which it addresses the fact that sexual harassment has both objective and subjective components. *See Harris v. Forklift Sys., Inc.*, 510 U.S. at 21-22. Ms. Kempker-Cloyd attempted to cope Dettmer's abuse by rebuffing each encroachment in a manner which was proportional to Dettmer's conduct. When his conduct crossed the line into physical abuse, she delivered an ultimatum in the presence of witnesses. It was only when Dettmer continued the harassment in the face of her ultimatum that she concluded that his conduct had altered the conditions of her employment. Because she formed that conclusion in May 1995, her complaint was timely. Unfortunately, the district court substituted its own subject reaction to the evidence for the reaction of Ms. Kempker-Cloyd. Because the district court concluded that Ms. Kempker-Cloyd could have reasonably made a complaint in December 1994, it refused to affirm her feeling that the situation became intolerable when the conduct continued after she had confronted Dettmer. Thus, it deemed her untimely for waiting until one more incident of harassment occurred before initiating the process in May 1995. However, this Court has made clear that in discrimination cases, the statutes of limitations should not be wielded in a grudging, hostile fashion. *Board of Regents v. Tomanio*, 446 U.S. 478, 487-88, (1980). As such, the district court should be reversed because it failed to heed this teaching and punished Ms. Kempker-Cloyd because she had shown a high degree of patience and toughness in attempting to cope with Dettmer's harassment of her.

II. The Denial of Parking Issue Coupled with the Denial of Letters of Commendations and Reprimand Are Sufficient "Adverse Actions" to Support a Claim of Retaliation.

Congress enacted Title VII to give as wide an application as possible to its efforts to eradicate employment discrimination. The language of the statute reflects this broad approach. It is illegal for an employer to:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee . . .

42 U.S.C. § 2000e-2. By its very terms, the statute applies to any action which deprives or tends to deprive an employee of an employment opportunity or benefit. With respect to federal employees, sex discrimination is a prohibited personnel practice outlawed by the Civil Service Reform Act. 5 U.S.C. § 2302 (b)(1). In this regard, the Civil Service Reform Act provides a detailed list of the sorts of personnel action which, when motivated by discrimination or retaliation, constitute violations:

> (A) "personnel action" means--
>
> (i) an appointment;
>
> (ii) a promotion;
>
> (iii) an action under chapter 75 of this title [*see* 5 U.S.C. § 7501 et seq.] or other disciplinary or corrective action;

> (iv) a detail, transfer, or reassignment;
>
> (v) a reinstatement;
>
> (vi) a restoration;
>
> (vii) a reemployment;
>
> (viii) a performance evaluation under chapter 43 of this title
>
> (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
>
> (x) a decision to order psychiatric testing or examination; and
>
> (xi) any other significant change in duties, responsibilities, or working conditions.

5 U.S.C. § 2302(a)(2). Thus, it is clear that federal employees such as Ms. Kempker-Cloyd enjoy protection from discrimination and retaliation in virtually every aspect of their work situation, including, *inter alia*, the right to a workplace and conditions free from harassment. *Calcote v. Texas Educ. Found., Inc.*, 578 F.2d 95, 97 (5th Cir. 1978); *Jalil v. Avdel Corp.*, 873 F.2d 701 (3d Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990).

The decision to retaliate against Ms. Kempker-Cloyd, by denying her a free parking space, as a result of her having rebuffed Dettmer's repeated sexual overtures and having directly opposed his sexual harassment by confronting him in the presence of others was a decision concerning benefits that had a tangible monetary impact on Ms. Kempker-Cloyd which is a prohibited personnel practice under 5 U.S.C. § 2302 (a)(2)(ix). Similarly, the denial of commendations to which she was otherwise due in retaliation for her initiating a

claim of discrimination were "decision[s] concerning ... awards" which were prohibited personnel practices under 5 U.S.C. § 2302(2)(a)(ix) and the imposition of reprimands were other disciplinary actions under 5 U.S.C. § 2302(2)(a)(iii). As such, these actions were illegal discrimination "with respect to her compensation, terms, conditions, or privileges of employment" which is prohibited by Title VII. Accordingly, the district erred in finding that these actions could not provide a basis for Ms. Kempker-Cloyd's claim of retaliation.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(any footnotes trail end of each opinion)

NO. 98-1999

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AGNES KEMPKER-CLOYD,
Plaintiff-Appellant,

v.

JANET RENO,
Defendant-Appellee.

November 22, 1999, Filed

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COUNSEL:
For AGNES KEMPKER-CLOYD, Plaintiff - Appellant: David H. Shapiro, Swick & Shapiro, Washington, DC.

For JANET RENO, Attorney General, Defendant - Appellee: Robert M. Loeb, Marleigh D. Dover, U.S. Department of Justice, Washington, DC.

JUDGES:

Before: GUY and BOGGS, Circuit Judges; and HOOD, District Judge. *

OPINION:

PER CURIAM. This is a Title VII case filed by Agnes Kempker-Cloyd, an Assistant United States Attorney, alleging that she was the target of sexual harassment and retaliation from the United States Attorney, Michael Dettmer, in violation of 42 U.S.C. § 2000e-16 (c). The district court granted summary judgment to the defendant Janet Reno, the Attorney General of the United States. The grant of summary judgment is reviewed by this Court de novo. See Abeita v. TransAmerica Mailings, Inc., 159 F.3d 246, 250 (6th Cir. 1998).

The major issue before this Court is whether the plaintiff filed a timely complaint of sexual discrimination based upon harassment with her Equal Employment Opportunity Counselor and the Equal Employment Opportunity Commission ("EEOC"). The issue turns on whether a May 1995 act of "crowding" in a stairwell could be construed by a reasonable jury as a part of the alleged continuing pattern of conduct which occurred in 1994. As the crowding incident is the only alleged act which could possibly fall within the statutory period, if this incident cannot be reasonably and legally construed as a continuing pattern of sexual harassment connected with the 1994 events, then plaintiff did not seek timely EEO counseling for her charge of sexual discrimination. The district court concluded that, seen in the context of the acts which occurred prior to December 6, 1994, the crowding incident in the stairwell cannot be considered such sexual harassment as to have altered the terms and conditions of the plaintiff's employment, and granted summary judgment to the defendant.

Having had the benefit of oral argument and having carefully considered the record on appeal, the briefs of the

parties, and the applicable law, we are not persuaded that the district court erred in granting summary judgment to the defendant.

Because the reasoning which supports judgment for the defendant has been articulated by the district court, the issuance of a detailed written opinion by this Court would be duplicative and serve no useful purpose. Accordingly, the judgment of the district court is affirmed upon the reasoning of that court in its oral Opinion rendered on July 27, 1998 and its written Opinion filed August 10, 1998.

Footnotes

* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Case Nos. 1:97-CV-85, 1:97-CV-463

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

AGNES KEMPKER-CLOYD,
Plaintiff,

v.

JANET RENO,
Defendant.

August 10, 1998, Decided

August 10, 1998, Filed

COUNSEL:
For AGNES KEMPKER-CLOYD, plaintiff (97-CV-85): David H. Shapiro, Swick & Shapiro, PC, Washington, DC.

For JANET RENO, defendant (97-CV-85): Michael Hayes Dettmer, U.S. Attorney, U.S. Attorney's Office, Grand Rapids, MI.

For JANET RENO, defendant (97-CV-85): Carole D. Bos, Bos & Glazier, Grand Rapids, MI.

For JANET RENO, defendant (97-CV-85): Anne M. Gulyassy, U.S. Department of Justice, Washington, DC.

For JANET RENO, defendant (97-CV-85): Phillip J. Green, U.S. Department of Justice, Washington, DC.

JUDGES:

GORDON J. QUIST, UNITED STATES DISTRICT JUDGE.

OPINIONBY:
GORDON J. QUIST

OPINION:

OPINION

This is a Title VII claim by an Assistant United States Attorney alleging that she was the target of sexual harassment and retaliation from the United States Attorney, Mr. Michael Dettmer ("Dettmer"). See 42 U.S.C. § 2000e-16.

Introduction

This Opinion addresses the major issue left open after this Court's oral opinion and written Order (docket no. 103) of July 27, 1998, namely, whether Plaintiff filed a timely Complaint of sexual discrimination based upon harassment with her Equal Employment Opportunity Counselor and the Equal Employment Opportunity Commission ("EEOC"). On July 27, 1998, this Court, construing all disputed material facts and drawing all reasonable inferences in favor of Plaintiff, held that a reasonable jury could find that prior to December 6, 1994, Plaintiff was the target of sexual harassment by Dettmer. In this ruling, this Court also held that the "discussion" in the U.S. Attorney's Office ("USAO") for the Western District of Michigan regarding the manner in which parking places were allocated did not create a sexually hostile environment or constitute retaliation against Plaintiff.[1]

This Court also said that the "crowding" in the stairwell, which occurred sometime in May 1995, could, perhaps, in the context of this case, be construed by a reasonable jury as part of the alleged continuing pattern of conduct which occurred in 1994. However, the Court reserved judgment on this issue

pending another review of the record. Whether or not the May 1995 crowding incident constitutes sexual harassment is important because it is the point upon which Plaintiff's claim must now rest. The law is very clear that it is critical that the Plaintiff establish that at least one Title VII violation occurred during the statutory period. See United Airlines, Inc. v. Evans, 431 U.S. 553, 558, 97 S. Ct. 1885, 1889, 52 L. Ed. 2d 571 (1977); Haithcock v. Frank, 958 F.2d 671, 678 (6th Cir. 1992). The crowding incident is the only alleged act which could possibly fall within the statutory period. Therefore, if this incident could not reasonably and legally be construed as part of a continuing pattern of sexual harassment connected with the 1994 events, then Plaintiff did not seek timely EEO counseling for her charge of sexual discrimination. In addition, even if the event is connected, Plaintiff's duty to seek EEO counseling could have arisen prior to 1995.

Legal Requirement Of Filing Complaint

Prior to filing a complaint of discrimination, an employee of the federal government must seek informal EEO counseling within forty-five days of the "matter alleged to be discriminatory" or the "effective date of the action." 29 C.F.R. § 1614.105(a)(1); cf. 42 U.S.C. § 2000e-12 (granting EEOC authority to issue procedural regulations to carry out Title VII provisions). EEOC regulations permit the forty-five day time period to be extended for several reasons, including if the employee "did not know and reasonably should not have [] known that the discriminatory matter . . . occurred," or "for other reasons considered sufficient by the agency or the Commission." 29 C.F.R. § 1614.105(a)(2).

> The same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. . . .

> . . . [The Supreme Court has] allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. [The Court has] generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95-96, 111 S. Ct. 453, 457-58, 112 L. Ed. 2d 435 (1990)(footnotes omitted)(extending holding of Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398, 102 S. Ct. 1127, 1135, 71 L. Ed. 2d 234 (1982) from private employer cases to federal government cases); see also Boddy v. Dean, 821 F.2d 346, 350 (6th Cir. 1987)(applying Zipes, in pre-Irwin case, to find counseling requirement from regulations also subject to equitable tolling). However, § 2000e-16(c), the statute of limitations on federal employee suits, "is a condition to the waiver of sovereign immunity and thus must be strictly construed," and courts should not extend equitable tolling to "a garden variety claim of excusable neglect." Irwin, 498 U.S. at 94, 96, 111 S. Ct. at 456, 458.

Within thirty days of the initial contact, or within up to ninety days upon written agreement, the EEO counselor must conduct a final interview and send the complainant written notice of the right to file suit within fifteen days of receiving the notice. See 29 C.F.R. § § 1614.105(d), (e).

Failure to file a timely charge of sexual harassment with an EEO counselor leads to the dismissal of the government

employee's Title VII case. Sweeney v. West, 149 F.3d 550, 1998 WL 344268 (7th Cir. 1998).

Facts Regarding Filing With EEO Counselor

Plaintiff initiated contact with Department of Justice EEO counselor Joan Smithson ("Smithson") on May 11, 1995. Plaintiff then filed a formal complaint regarding the parking incident on May 30, 1995. This formal complaint did not mention the May 1995 crowding incident. After reading the May 30 complaint, Smithson asked Plaintiff if Dettmer had done anything since 1994. (See Kempker-Cloyd Dep. at 719-20, Pl.'s Ex. 18.) Plaintiff then told Smithson about the crowding incident over the phone, and on June 19, 1995, Plaintiff faxed a list of incidents to Smithson elaborating on the 1994 incidents and updating her on subsequent events, including the crowding incident. (See Pl.'s Ex. 51.) Taking June 19, 1995, as the first date on which Plaintiff contacted Smithson about the crowding incident, the notification would be timely only if the incident occurred on or after May 5, 1995. Assuming only for purposes of summary judgment that the notification to Smithson was timely, Plaintiff's formal complaint was timely because the final interview was on July 25, 1995, (see Def.'s Ex. H), and she filed her administrative complaint on August 8, 1995, within fifteen days of her final interview.

Discussion

A. Continuing Violation.

Plaintiff argues that her claims are not time-barred because Dettmer engaged in a continuing pattern of sexual harassment, discrimination, and retaliation which created a hostile working environment. (Pl.'s Br. at 39-44.)[2] A hostile working environment occurs when the behavior is sufficiently severe or pervasive so as to alter the conditions of the victim's employment and create an abusive working

environment. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295 (1993); Oncale v. Sundowner Offshore Serv., Inc., 140 L. Ed. 2d 201, U.S. , 118 S. Ct. 998, 1001 (1998). Title VII forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment. Oncale, U.S. at , 118 S. Ct. at 1003 (emphasis added). There is no doubt that most claims of sexual discrimination because of a hostile work environment involve a continuum of acts which only in their cumulative effect create such a sexually hostile work environment as to amount to sexual discrimination cognizable by Title VII. See Galloway v. General Motors Serv. Parts Operations, 78 F.3d 1164, 1166 (7th Cir. 1996); Draper v. Coeur Rochester, Inc., 147 F.3d 1104, 1998 WL 340411, at *5 (9th Cir. 1998). The difficult issue in a sexual harassment case, then, is deciding where on the continuum of acts the duty of notifying the EEO counselor arises. The issue is difficult because there is no single event, such as a termination, to which the victim can point as the event which triggered the victim's statutory duty.

In the context of sexual harassment, the following portion of the opinion in Galloway lays out the law accurately and clearly:

> Sexual harassment serious enough to constitute unlawful discrimination on grounds of sex is often a cumulative process rather than a one-time event. In its early stages it may not be diagnosable as sex discrimination, or may not cross the threshold that separates the nonactionable from the actionable, or may not cause sufficient distress to be worth making a federal case out of . . . . We do not want to encourage premature or precipitate litigation. If the victim of sexual harassment sues as soon as the harassment becomes

sufficiently palpable that a reasonable person would realize she had a substantial claim under Title VII, then she sues in time and can allege as unlawful conduct the entire course of conduct that in its cumulative effect has made her working conditions unbearable. We emphasize the bearing on this principle of the safe harbor that we created in Baskerville for employers accused of failing to prevent low-level harassment. The effect of that decision is that victims of harassment will often be required to wait and see whether the harassment persists or escalates to a level at which the ship leaves the harbor.

The concept of cumulation suggests a critical limiting principle. Acts of sexual harassment so discrete in time or circumstances that they do not reinforce each other cannot reasonably be linked together into a single chain, a single course of conduct, to defeat the statute of limitations. . . .

The most difficult case arises when a long-continued series of harassing acts definitely are a series, a pattern, and not merely a set of discrete events, yet it was evident long before the plaintiff finally sued that she was the victim of actionable harassment. It seems to us that in such a case, while she can still sue provided that the last act of harassment occurred within the statute of limitations, she cannot reach back and base her suit also on conduct that occurred outside the statute of limitations; for she had no excuse for waiting that long. An additional consideration is that the bringing of the suit is almost certain to stop the harassment, so that unlike certain

> cases of nuisance the plaintiff will not be put to the expense of bringing successive suits. What is more, she can always seek injunctive relief against a continuation of the unlawful conduct.
>
> The principle that we extract from this discussion and that we think organizes the complex and diffuse case law on continuing violations under Title VII is that the plaintiff may not base her (in some cases his) suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in the light of events that occurred later, within the period of the statute of limitations.

78 F.3d 1164 at 1166-67 (first and third emphases added)(citations omitted).

In Provencher v. CVS Pharmacy, 145 F.3d 5, 1998 WL 254432 (1st Cir. 1998), the First Circuit said, in the context of a sexual harassment claim:

> Even where a plaintiff alleges a violation within the appropriate statute of limitations period, the continuing violation claim will fail if the plaintiff was or should have been aware that he was being unlawfully discriminated against while the earlier acts, now untimely, were taking place. . . .
>
> * * *
>
> . . . As Provencher admits that he knew he was being harassed long before he brought his

> sexual harassment suit, and certainly had this knowledge before the statute of limitations period had run, his continuing violation claim cannot stand.
>
> It also fails because Provencher has not demonstrated that the timely acts are linked to the untimely acts by similarity, repetition or continuity.

Id. at , 1998 WL 254432, at *8.

In Webb v. Cardiothoracic Surgery Associates of North Texas, P.A., 139 F.3d 532 (5th Cir. 1998), the district court dismissed plaintiff's claims of sexual harassment because of the statute of limitations. Id. at 538. The Court of Appeals affirmed and agreed that the alleged perpetrator's conduct was not part of a series of related acts constituting a continuing violation for the following reasons:

> "the core idea [of the continuing violation theory] is that equitable considerations may very well require that the filing periods not begin to run until facts supportive of a Title VII charge or civil rights action are or should be apparent to a reasonably prudent person similarly situated. The focus is on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights."

Id. at 537 (quoting Glass v. Petro-Tex Chem. Corp., 757 F.2d 1554, 1560-61 (5th Cir. 1985))(omitting citations)(alterations in original). "Where the unlawful employment practice manifests itself over time, rather than as a series of discrete acts," a Title VII plaintiff is relieved of the burden of proving that the entire violation occurred within the actionable period, "provided the plaintiff can show a

series of related acts, one or more of which falls within the limitations period." Webb, 139 F.3d at 537 (internal quotations and alterations omitted). In applying these principles, the district court and court of appeals both examined the plaintiff's own perception of the events. See id. at 538. The courts held that her claim was barred because she was "aware and knew of facts [outside of the statutory period] that were supportive of a Title VII charge." Id.

Draper held that in order to assert a timely claim of sexual harassment, the target must raise a sufficient question of whether the hostile work environment of which she complains existed during the statutory period. 147 F.3d 1104, at 1998 WL 340411, at *5. Draper found that a continuing violation could be premised upon a series of closely related similar incidents that took place within the same general period and stemmed from the same source. Id. at , 1998 WL 340411, at *5. In determining whether any individual event occurred within the proper time frame, the court and jury could examine the event "in light of the circumstances that preceded it and the nature of the relationship that existed between Draper and her supervisor." Id. at 1109, 1998 WL 340411, at *6. Draper introduced evidence that the wrongful conduct "persisted for most of her term of employment." Id. at 1109, 1998 WL 340411, at *5.

The standard that a person who is the subject of continuing discrimination must sue "as soon as the harassment becomes sufficiently palpable that a reasonable person would realize she had a substantial claim under Title VII," Galloway, 78 F.3d 1164 at 1166, is substantially identical to the Sixth Circuit's rule as stated in Conlin v. Blanchard, 890 F.2d 811 (6th Cir. 1989), a race discrimination case, that "in order to allege a continuing violation with regard to employment decisions, a court is to look at what event should have alerted the average lay person to protect his rights," id. at 815 (internal quotations omitted).

This Court gleans two legal principles from these cases:

1. The statute of limitations starts to run when a reasonable person would realize she had a substantial claim.

2. In order for there to be a continuing violation, the harassing acts must be linked together in a single course of conduct involving related acts.

1. A reasonable person in the position of Plaintiff would have realized that she had a Title VII claim no later than December 6, 1994.

This Court is convinced that any reasonable person under Plaintiff's version of the facts and circumstances of this case would have realized she had a substantial claim of discrimination prior to December 6, 1994. The alleged "swatting" on Plaintiff's butt, which Plaintiff's brief characterizes as an "obscene and Neanderthal act" and "perhaps the most chilling of all Dettmer's acts of naked sexual harassment of plaintiff," (Pl.'s Br. at 15), occurred on February 10, 1994. The so-called after-hours threat, which Plaintiff's brief describes as "chilling," (Pl.'s Br. at 11), allegedly occurred between April 4 and 13, 1994. All other acts, except the May 1995 crowding incident, occurred prior to December 6, 1994.

In addition, Plaintiff's complaints to her EEO counselor and to the EEOC are filled with statements that conclusively indicate not only that a reasonable lay person would have recognized that she was the target of sexual harassment, but also that Plaintiff, in fact, believed that she was such a target. Provencher held this type of personal perception to be significant:

> In Sabree, we rejected the plaintiff's continuing violation claim because the plaintiff admitted that he believed, at every turn, that he was being discriminated against. We reasoned that a knowing plaintiff has an

> obligation to file promptly or lose his claim: "this can be distinguished from a plaintiff who is unable to appreciate that he is being discriminated against until he has lived through a series of acts and is thereby able to perceive the overall discriminatory pattern."

145 F.3d at , 1998 WL 254432, at *8 (quoting Sabree v. United Bhd. of Carpenters and Joiners Local No. 33, 921 F.2d 396, 402 [*17] (1st Cir. 1990)(alteration in original)); see also Webb, 139 F.3d at 538. Some of these indications that Plaintiff recognized she had a claim are:

> (1) On June 7, 1994, Plaintiff asked a co-worker to act as "bodyguard" at a party.
>
> (2) On June 9, 1994, Plaintiff asked another AUSA to go to breakfast with her so that she did not have to be alone with Dettmer.
>
> (3) On June 23, 1994, Plaintiff asked another AUSA to be her "bodyguard" at a retirement party.
>
> (4) On July 19, 1994, Plaintiff watched a DOJ sexual harassment video.
>
> (5) On August 30, 1994, Plaintiff told Dettmer, in front of other AUSAs, that she did not trust him and did not like him. After this meeting, she talked about sexual harassment with another AUSA who said that "they" (male AUSAs) "don't understand harassment."

(See Pl.'s EEOC Compl., Def.'s Ex. H.)

> (6) On December 6, 1994, Plaintiff told Dettmer that she perceived his behavior to be sexual harassment.

This Court believes, and finds as a matter of law, that the EEOC was correct in concluding as follows:

> In this case, the record clearly establishes that appellant had a reasonable suspicion of discrimination by December 6, 1994. In her Initial Allegation of Discrimination, appellant states that at a meeting with the RO and two other management officials on December 6, 1994, she informed the RO that she "perceived his behaviour (sic) to be sexual harrassment (sic) and that I would file a formal complaint if it continued or if they retaliated against me." Appellant clearly had an obligation to contact an EEO Counselor at that time if she wished to preserve her rights with regard to her allegation of sexual harassment by the RO.

(Agnes Kempker-Cloyd v. Janet Reno, Appeal No. 01961964, Agency No. A-95-1023 (EEOC Jan. 13, 1997), Def.'s Ex. K.)

2. The crowding incident of May 1995 was not harassment linked to acts which occurred prior to December 6, 1994.

In her June 19, 1995, written statement to Smithson, Plaintiff said that there was no incident of sexual discrimination between December 6, 1994, until the "parking" issue, which occurred about May 2, 1995. (See Def.'s Ex. H.) In fact, the major item of Complaint in Plaintiff's charge of discrimination is the USAO's and the Executive Office of United States Attorneys' ("EOUSA") considering assigning parking places on criteria other than

seniority. (See id.) On May 26, 1995, Plaintiff told her supervisor that they could settle Plaintiff's dispute outside of the EEOC process by giving Plaintiff "the parking space based on seniority and don't retaliate against me." (See id.) As pointed out earlier in footnote 1, this Court has already held that there is no evidence to support the argument that the parking issue involved any kind of sexual harassment or discrimination.

The only other incident which occurred between December 6, 1994, and Plaintiff's contact with EEO counselor Smithson which arguably could constitute sexual discrimination against Plaintiff is the so-called "crowding" incident on the stairwell, which also occurred sometime in early May 1995. This Court has carefully reexamined all of the record evidence referred to by the parties regarding this incident. This Opinion contains all of that evidence except Dettmer's denial. The Plaintiff alleged:

> December 6, 1994 meeting
>
> This was outlined in my initial complaint
>
> I have not had further problems with Mr. Dettmer after this meeting until the parking issue. I was carrying a box with books, pictures and a plant from the fifth floor to the sixth floor when Mike came up the stairs following me too close. I asked him if he wanted to pass and he said no. When we got to the top of the stairs he continued to shadow me all the way down the hall, instead of passing or walking beside me. I ducked into the zerox [sic] room and he said leaving so soon. I informed him that this was the quikest [sic] route to my office and say howdie to Dan for me.

(Pl.'s EEOC Compl., Def.'s Ex. H (originally sent by facsimile to Smithson on June 19, 1995, Pl.'s Ex. 51).)

The Plaintiff was questioned during her deposition about this allegation:

> Q. Okay. That's what I'm wondering about, is what occasioned this to be sent to her.
>
> A. She talked to me about my complaint, particularly since I had sexual harassment in there, and asked me if anything had occurred recently, and I told her that he had followed me up the stairway with a box into this build [sic], I asked him to pass me and he was right on top of me, as if he was my shadow, and I told her that I felt that I was getting the message either give up on the parking or I'm not going behave like a gentlemen. I'm going to start back again, and she asked me to write down everything that happened instead of like I had it in here, kind of this, he's asking me to breakfast, he asking me to lunch, he's doing these things, she wanted a list of everything that I could remember that had happened.
>
> Q. Was it your understanding that -- I guess I'm trying to understand, based upon your comments to her, what Mr. Dettmer did with respect to crowding you, why that would prompt her to ask for a list of all the sexual harassment allegations going back to the beginning?
>
> A. I believe what she said is has he sexually harassed you since that time. I said yes, and I

> gave her the incident, what he did, and, then, she says to me I want you to give a complete breakdown, as best you can, of every single thing that happened.
>
> Q. Oh. I see.

(Kempker-Cloyd Dep. at 717-18, Pl.'s Ex. 18.)

A target employee's failure to file a timely complaint of discrimination does not give the employer a license to continue the harassment beyond the time a victim is first aware of her claim. See Galloway, 78 F.3d at 1167. However, in order to link timely events (within the statutory period) with untimely events, the timely events must be sexual in character. They cannot involve only obnoxious, impolite, or boorish conduct. See id. at 1167 (finding timely event not linked because calling plaintiff a "sick bitch," plus giving other verbal abuse and making an obscene gesture, "was, in context, not a sex- or gender-related term"); Provencher, 145 F.3d at , 1998 WL 254432, at *9 (holding that otherwise neutral behavior contained in timely allegations was "too separated by character and time to be viewed as a repetition of the untimely acts" and that, while context was relevant, timely allegations themselves had to have sexual overtones to be actionable); Logan v. Royal Oak Township Pub. Safety Dep't, No. 96-1222, 1997 WL 589265, at *1 (6th Cir. Sept. 23, 1997)(holding that where the only timely allegations themselves "were not of a sexual or discriminatory nature, [the plaintiff] failed to establish a continuing violation"). In addition, in order to establish the linkage of a continuing violation in the context of sexual harassment, the plaintiff must show that the timely and untimely events were close in time, similar, repetitious, or continuous. See Galloway, 78 F.3d at 1166-67; Draper, 147 F.3d at , 1998 WL 340411, at *5 (finding continuing violation supported by "closely related similar occurrences that took place within the same general

time period and stemmed from the same source"); Provencher, 145 F.3d at , 1998 WL 254432, at *8.

This Court concludes that, seen in the context of the acts that occurred prior to December 6, 1994, the "crowding" incident on the stairwell cannot be considered such sexual harassment as to have altered Plaintiff's terms or conditions of employment.

a. The act was not of a sexual nature.

The incident as described by Plaintiff does not objectively exhibit any type of sexually harassing activity. "Crowding" can be just as offensive to American men as to women, but as described by Plaintiff, the crowding was not objectively offensive to anyone: Plaintiff does not say that Dettmer touched her; she does not say that Dettmer breathed on her; she does not say that Dettmer made any disparaging remark; she does not say that Dettmer hindered her in going where she wanted to go; she does not say that Dettmer was on the stairwell simply to get close to her (thereby distinguishing this case from a stalking case); Plaintiff and Dettmer were on the stairwell together, at most, for one flight - from the fifth floor to the sixth; and the incident was so insignificant in Plaintiff's perception that she did not even mention it in her initial contacts with Smithson. There is no basis for any assumption that Dettmer was not simply being polite when he did not pass Plaintiff on the stairwell, and declining to pass someone on the stairwell, especially when the person is carrying "a box with books, pictures and a plant," (Def.'s Ex. H), is not an harassing act.[3] The act as described by Plaintiff was simply two people being on the stairwell and hallway for a short time together while they were both in the necessary process of moving from the Gerald R. Ford Federal Building to the Law Building. Furthermore, regarding this incident, as this Court said during the hearing on July 27, this country has not yet reached a point where there is a regulation that requires one employee to stay at least three stairs away from

another employee or that requires one employee to stay at least three and a half feet from another employee while they are at the water cooler (i.e., because three steps or feet is harassment, but four steps or feet is not). Certainly, there is nothing in the law or "common sense," see Oncale, 118 S. Ct. at 1003, that would prohibit a United States Attorney from being on a stairwell at the same time as one of his assistants - especially when they both are in the necessary process of moving their offices.

b. The act is not linked by time, similarity, repetition, or continuity.

In addition to not constituting harassment of a sexual nature, the crowding incident is not linked by time, similarity, repetition, or continuity to the 1994 events. By Plaintiff's own admission, the event was separated by five months from what she considered the last prior harassing event (the December 6, 1994, meeting), by over one year from the crowding at Arnie's (February 1994), the "butt swatting," and the after hours threat. The event is not similar to any other event - it is the only "following" or "stairwell" incident. The incident was not a repeat of a prior event, and it was not repeated thereafter. The event was not part of a continuous pattern; it is the only harassing event to have occurred within about a nine-month period - from December 6, 1994, until Plaintiff filed her complaint with the EEOC on August 8, 1995. It also appears to be the last allegedly harassing event with any evidentiary support that Dettmer was involved.

Thus, any claim that Plaintiff had under Title VII is barred because Plaintiff did not seek timely EEO counseling. Therefore, the Court will grant Defendant summary judgment on Plaintiff's sexual harassment claim.

B. Retaliation Claims.

"In order to prove retaliation, a plaintiff must demonstrate: (1) that she was engaged in activity protected under Title VII; (2) that she was the subject of an adverse employment action; and (3) that there is a causal link between the protected activity and the adverse employment action." Johnson v. United States Dep't of Health & Human Serv., 30 F.3d 45, 47 (6th Cir. 1994). The parties agree that Plaintiff's filing of EEOC charges constituted protected activity.

As stated on the record at oral argument on July 27, 1998, the Court has already dismissed Plaintiff's retaliation claim to the extent she bases it on allegations of vandalism, disturbing phone messages, and surveillance because the record is devoid of any evidence linking these alleged events to Dettmer. At Plaintiff's request, the Court reserved its ruling on the alleged disturbance of Plaintiff's office because Plaintiff argued at the hearing that the removing of her coffee cup from her locked office linked the alleged disturbance to Dettmer. However, the only descriptions of this incident which the Court could find in the record date the incident around the Fall of 1994 or some time prior to her first complaints about Dettmer in December 1994. (See 8/8/95 EEOC Compl. attachment to P 7, Def.'s Ex. H; Fax from Kempker-Cloyd to Smithson of 6/19/95 at 7, attached to Def.'s Ex. H.) Therefore, the alleged disturbance could not have been in retaliation for her complaints and would be untimely under Part A. of this Opinion. To the extent Plaintiff alleges disturbances of her office "starting in mid-June of 1995," (Pl.'s Resp. Br. at 38), she has presented no evidence linking such disturbances to Defendant.[4]

Plaintiff presented evidence that Dettmer admitted that he wanted to remove her from office because "he felt her judgment was inappropriate, in the context of he felt that the [EEOC] claims she was making against him and others were unjustified and inappropriate and, if untrue, warranted her dismissal." (Gezon Dep. at 159, Pl.'s Ex. 32.) Dettmer also

considered "some appropriate official sanction" through the executive office. (Id. at 167; cf. Letter from Dettmer to DiBattiste of 8/9/95, Pl.'s Ex. 61; Letter from Dettmer to DiBattiste of 12/10/96, Pl.'s Ex. 56 at 004502 (recommending Kempker-Cloyd's termination, in part for false allegations of sexual harassment).) In addition, Edith Landman testified that Dettmer told her he had "contacted the executive office for the United States Attorneys to see if it is appropriate to have Agnes removed" based on her conduct prior to January 1996. (Landman Dep. at 8-9, Pl.'s Ex. 53.) Plaintiff also presented evidence that two of her male colleagues who received letters of commendation from the IRS subsequently received letters from Janet Reno regarding the IRS letters, whereas Plaintiff never even received copies of the IRS letters written on her behalf. (See Pendery Dep. at 27-30, Pl.'s Ex. 31.) The Court finds that Plaintiff has created an issue of fact with regard to retaliatory motive because under 42 U.S.C. § 2000e-3(a), the filing of a charge is protected activity regardless of the merits of the underlying allegations. See Wyatt v. City of Boston, 35 F.3d 13, 15 (1st Cir. 1994)(per curiam).

However, "to constitute an adverse employment action, an act must result in a loss in pay or benefits, a detrimental change in responsibilities, a negative change in the terms and conditions of employment, or some such actual and unfavorable change in job status." Birone v. Indian River Sch., 1998 U.S. App. LEXIS 7603, *11, No. 97-3212, 1998 WL 199791, at *4 (6th Cir. Apr. 15, 1998)(per curiam); see also Sweeney, 1998 WL 344268, at *6 (holding that definition of adverse employment action in retaliation case did not cover allegedly unfair reprimands and admonishments "absent some tangible job consequence"). Dettmer's attempts to have Plaintiff terminated did not succeed, and Plaintiff presented no evidence of other disciplinary action resulting from those attempts. Furthermore, since Plaintiff was not even aware of these efforts until late in discovery, (see Pl.'s Resp. Br. at 28-29),

they could not have harassed her, created a hostile environment, or otherwise affected her job performance or job conditions.

Plaintiff argues that Dettmer's requests resulted in the investigation by Page Newton of the executive office into her disruptive effect on the workplace. (See Def.'s Resp. to Pl.'s 1st Set of Interrogs. at 8, Pl.'s Ex. 65.) In Birone, the court explicitly held that an allegedly retaliatory investigation into rumors of workplace misconduct by the plaintiff could not "form the basis of a retaliation claim, because it did not result in [] any disciplinary action against [the plaintiff]." 1998 WL 199791, at *4. Plaintiff failed to present evidence that she suffered any adverse effects from the conducting of the investigation or any disciplinary action as a result therefrom. In fact, she continued to receive the highest possible overall ratings on her work evaluations during the period at issue. (See Pl.'s Exs. 14-16.)

Lastly, Plaintiff argues that Dettmer's letter of admonishment, dated April 17, 1996, was an adverse action. In the letter, Dettmer alleges that Plaintiff is guilty of rumor-mongering and states: "Therefore, if you are the source of these rumors, I order you to immediately cease and desist with such conduct; otherwise, disciplinary action will follow." (Letter from Dettmer to Kempker-Cloyd of 4/17/96, Def.'s Ex. II.) Plaintiff presented no evidence that any disciplinary action followed the letter. In the analogous case of Sweeney, the plaintiff's supervisor issued her two written counseling statements advising the plaintiff to cease certain conduct and warning her that "any 'further complaints of behavior and conduct of this nature will result in disciplinary action.'" 1998 WL 344268, at *4 (quoting statement). The court held that the statements were not materially adverse actions for purposes of the plaintiff's retaliation claim, reasoning that

> a simple statutory prohibition against retaliation would be turned into a bizarre measure of extra protection for employees who--though they might genuinely need counseling--at one point complained about their employer. [By holding otherwise, the court] also would be deterring employers from documenting performance difficulties, for fear that they could be sued for doing so. Employees would be left in the dark as to how they could improve their work performance . . . .

Id. at *6. This Court finds the holding in Sweeney under analogous facts persuasive.

Therefore, the Court finds that Plaintiff has failed to create an issue of fact with regard to whether she was the subject of any adverse employment action and will grant Defendant summary judgment on Plaintiff's retaliation claims.

Conclusion

For these reasons, Defendant's Motion For Summary Judgment will be granted. A separate Order will issue.

Dated: AUG 10 1998

GORDON J. QUIST

UNITED STATES DISTRICT JUDGE

ORDER

For the reasons stated on the record on July 27, 1998, and for the reasons set forth in this Court's Opinion dated today,

IT IS HEREBY ORDERED that Defendant's Motion For Summary Judgment (docket no. 63) is GRANTED, and this case is dismissed in its entirety.

Dated: August 10, 1998

GORDON J. QUIST

UNITED STATES DISTRICT JUDGE

Footnotes

[1] There was no harassment in the "parking issue" because, among other reasons, the discussion about whether to allocate parking on a basis other than seniority was not part of a series of closely related similar occurrences and was being discussed on a non-discriminatory basis. It was not sexual in nature. Furthermore, the record is devoid of any evidence that the possibility of changing the criteria for allocating parking places was aimed at Plaintiff either as part of a continuing course of conduct or as a retaliatory act. See, e.g., Logan v. Royal Oak Township Pub. Safety Dep't, 1997 U.S. App. LEXIS 26507, No. 96-1222, 1997 WL 589265, at *1 (6th Cir. Sept. 23, 1997)(unpublished). The fact that an employer contemplates making a generally applicable employment decision after a dispute with an employee is insufficient evidence that the consideration was because of the dispute with the employee. See Walborn v. Erie County Care Facility, 150 F.3d 584, 1998 WL 425874, at *6 (6th Cir. 1998); Abbott v. Federal Forge, Inc., 912 F.2d 867, 875 (6th Cir. 1990)(noting that "post hoc, ergo propter hoc is not a rule of legal causation" in holding that plaintiffs failed to establish connection between employer's hiring practice and disparate impact on older applicants); Latosky v. Morrison-Knudsen Corp., 1996 U.S. App. LEXIS 32709, No. 95-4176, 1996 WL 708346, at *3 (6th Cir. Dec. 5, 1996)(holding that "the mere fact that adverse employment actions occurred after plaintiff engaged in protected activity is insufficient to support an inference of retaliation" and citing Cooper v. City of North Olmsted, 795 F.2d 1265, 1272 (6th Cir. 1986)). "Post hoc ergo propter hoc is not enough to support a finding

of retaliation--if it were, every employee would file a charge just to get a little unemployment insurance. Timing may be an important clue to causation, but does not eliminate the need to show causation--and [the plaintiff] really has nothing but the post hoc ergo propter hoc 'argument' to stand on." Bermudez v. TRC Holdings, Inc., 138 F.3d 1176, 1179 (7th Cir. 1998)(citation omitted).

[2]The Sixth Circuit has held that the continuing violation theory asserted by Plaintiff is a narrowly limited exception to the usual rule that statutes of limitations are triggered when the alleged discriminatory act occurred. Haithcock v. Frank, 958 F.2d 671, 677-78 (6th Cir. 1992)(quoting Dixon v. Anderson, 928 F.2d 212, 216 (6th Cir. 1991)). In the Sixth Circuit, there are two categories of continuing violations in discrimination cases. The first category arises

> "where there is some evidence of present discriminatory activity giving rise to a claim of a continuing violation; that is, where an employer continues presently to impose disparate work assignments or pay rates between similarly situated groups."

Haithcock, 958 F.2d at 678 (quoting Dixon, 928 F.2d 212 at 216). As to the first category, at least one discriminatory act must have occurred within the relevant statutory period. Haithcock, 958 F.2d at 678 (citing Dixon, 928 F.2d at 216). The second category of continuing violation arises when there is "'a longstanding and demonstrable policy of discrimination.'" Haithcock, 958 F.2d at 678 (quoting Dixon, 928 F.2d at 217). In the Sixth Circuit, unrelated incidents of discrimination are not sufficient to invoke this exception; there must be an "overarching" policy of discrimination. Haithcock, 958 F.2d at 678 (citing Dixon, 928 F.2d at 217). This Court has not been directed to any reported Sixth Circuit case clearly discussing the continuing violation theory in the

context of the continuum of sexual harassment. However, as pointed out later, other circuits have discussed the issue.

[3]It appears from combining Plaintiff's EEOC complaint and her deposition that both Plaintiff and Dettmer were carrying boxes.

[4] Plaintiff failed to attach most of the portions of the record which she cited in support of her allegations of June 1995 disturbances. The portions which she did attach contained evidence only that some disturbances occurred at some unspecified times and no evidence of any sort that Dettmer was involved. (See Ferguson Dep. at 95-96, Pl.'s Ex. 20; Smith Dep. at 87-89, Pl.'s Ex. 26.)

NO. 98-1999
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AGNES KEMPKER-CLOYD,
Plaintiff-Appellant,

v.

JANET RENO,
Defendant-Appellee.

February 25, 2000, Filed

BEFORE: GUY and BOGGS, Circuit Judges; and HOOD, *District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reiewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

Footnotes

*Hon. Joseph Hood, United States District Judge for the Eastern District of Kentucky sitting by designation.

Case Nos. 1:97-CV-85, 1:97-CV-463

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

AGNES KEMPKER-CLOYD,
Plaintiff,

v.

JANET RENO,
Defendant.

This is a transcript of the hearing re Defendant's Motions for Summary Judgment held before The Honorable Gordon J. Quist, U. S. District Judge, in Grand Rapids, Michigan, on July 27, 1998.

she isn't. But even the Uniform Commercial Code in dealing with commercial law allows -- finds that a lawyer is not -- who is a' skilled merchant under the Code, when he's stealing for his own account, he's accorded no special knowledge as a skilled merchant though he works in commercial law in his professional capacity. When you're involved, particularly in a sexual harassment case there is no special experience. She was in the throes of it.

The second analogy I want to make goes directly to what Mr. Green said. Your Honor, if this were a criminal hater and I were the prosecutor and I had gotten an indictment on this evidence, though my burden of proof is the highest in Anglo-American law -- beyond a reasonable doubt --,you would not strike the indictment. You would let the trial go forward. We have a right, as the prosecutor, to try to prove our case even though on this evidence it doesn't look like we can make beyond a reasonable doubt.

Here I am representing a plaintiff, a plaintiff who has a burden of the minimum in Anglo-American law -- preponderance of the evidence. This evidence stacked against that evidence suggests one thing: That there is going to be -- that there needs to be a trial before a jury so we can get at the truth of this matter because the evidence is contested. And that's all we're here to do.

And I would suggest to Your Honor that on the great balance of these charges, these claims, we must go to trial to be resolved. It is true the indictment, the charge is trumpeted in the headline. Don't let the resolution be a footnote on page 6. Let her have her day in court. She's entitled to it. The evidence is at issue.

Thank you.

THE COURT: Thank you, Mr. Shapiro.

This case will be in recess for twenty minutes. But I want to see Mr. Phelan and Mr. Courtade up here a minute. You can do whatever you want to do for twenty minutes.

(Court was recessed from noon until 12:25 p.m.)

THE COURT: Please be seated.

First of all, I want to thank the lawyers for the fine work they did on their written presentations, their assembly of the evidence, and their oral arguments here today It's always a pleasure for a judge to have good la4ers working with them trying to come to a fair, just, and inexpensive resolution of issues that are put before the Court.

Quite frankly, I think in the federal judiciary, I probably am as aggressive as any federal judge in granting

summary judgment motions. I don't know why that is, just that I used to make a lot and used to be successful in them often when I was a lawyer and always thought that was a nice way to practice law. On the other hand, of course, I've got to make an honest decision based on the facts and law presented to me in a specific situation. When I do that:, the parties are of equal status.

Although, I think that any EEO claim against anybody in my organization -- such as the U.S. Attorney's Office or any private law firm -- would certainly be a disruptive influence, the Congress of the United States has pretty clearly said and the United States Courts have clearly said that there can be no retaliation for any type of utilization of the rights and remedies that Title VII provides, either in the private workplace or in a governmental setting.

I worked many hours -- not as many as the lawyers, I'm sure -- preparing for this and have prepared an outline of my thoughts. And I don't think I can resolve all the issues that I have to resolve today, but I can resolve, in my judgment, a number of them.

And I'm going to refer to Rule 56(d) of the Federal Rules of Civil Procedure:

> "If on a motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the Court at the hearing of the motion, by examining the pleadings and evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually in good faith controverter. It shall, thereupon, make an order specifying the facts that appear without substantial controversy,

> including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the actions as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

In other words, do your best to separate the issues, decide the issues, and decide which issues are available for trial, which issues are not.

As an initial matter, after the motion was filed in this case, the Supreme Court decided the case of Ocala v. Sundowner Offshore Services, 118 Supreme Court 998 (1998). Although that case decided the precise issue of whether same-sex harassment was actionable under Title VII, the Court necessarily had to address to some extent what constituted sexual harassment, or more accurately, sexual discrimination. The Court held that the key issue is not the gender of the plaintiff or the perpetrator. Nor is it the sexual content or connotation of the words used. Rather the plaintiff must establish that the harassment is because of sex -- that is, that the plaintiff was exposed to a disadvantageous term or condition of employment to which members of the opposite sex were not exposed.

I read some important parts of this case earlier when I gave my opening statement to you, so you would be helped in focusing your arguments to me.

The plaintiff must meet an objective and subjective standard. Regarding objective severity, the Supreme Court said that it should be judged from the perspective of a reasonable person in the plaintiff's position, considering all of the circumstances.

That, in my mind, is the objective test to be applied in this case. As the Court said in Galloway v. General Motors Service Parts Operations, 78 F.3rd 1164 (7th Circuit 1996) in these cases, context is everything.

Regarding the subjective standard the plaintiff is not required to show only that she had a subjective perception of a hostile environment; that, for example, Mr. Dittmer was discriminating against women. But she must also show that she at some point was actually injured by the challenged conduct; that is, that she personally was exposed to disadvantageous terms or conditions of employment because of her sex. She must show that she suffered discrimination because of her sex. This is necessary to meet the statutory requirement that the challenged conduct alter the plaintiff's terms and conditions of employments. If working conditions are not altered, then Title VII is not implicated.

The crowding and touching in Arnies' Restaurant in January of 1994, for example -- and only for an example -is in and of itself a mere -- at worse, a mere intersexual flirtation, I think. Thus, in my judgment, being an obnoxious person or a bully or domineering or rude or utilizing poor judgment -- and I'm not suggesting that Mr. Dittmer is any of these. I'm simply saying what these things are and they do not constitute sexual harassment cognizable under Title VII.

Furthermore, in most contexts, being too close to someone in a line or on a stairwell does not, of itself, constitute sexual harassment. Invading one's personal space is just as offensive to men as it is to women -- at least in America, and I don't think that's true everywhere, but at least in America -- even when there is no sexual connotation in the behavior.

As I said during the course of oral argument, the

EEOC does not establish regulations that one gender must stay 3.5 feet from another person -- although, they might want to that some day -- while they're standing at the water bottle, and not yet stabbed a rule or regulation that person must take three or four steps behind someone going up the stairwell. Although invading another's personal space may be offensive, it does not necessarily constitute sexual harassment. In our society, invading, as I said, someone's personal space is just as obnoxious to one person as to another.

As a matter of fact, it's a reason I make lawyers stay away from these witnesses when they're testifying here and stay away from the jury, both witnesses and jurors having thanked me for doing that when a lawyer gets -- sometimes tries to get in the face of a witness over here.

Furthermore, I have pointed out that in Oncale, Justice Scalia said that the workplace is not intended to be asexual or androgenous. The law does not prohibit male on male horse lay or intersexual flirtation. The workplace is in common meeting place of the two sexes and many happy marriages occur because of these meetings in the workplace. In fact, it's probably one of the prime places that people meet spouses, that and in college. From personal experience I can say that lovely grandchildren arise from
some of these meetings.

Furthermore, it is difficult for me to see how asking someone what Greek sex is can, in and of itself, constitute sexual harassment. I think some people think I've led a sheltered life; but until that phrase came up in the context of this case, I never heard the phrase in my whole life. I was just as naive about it, quite frankly, as, Mr. Dettmer purported to be.

Therefore, if the phrase is raised in a conversation or

document, it seems to me to ask what the phrase means is a legitimate question unless there is some evidence that Mr. Dettmer really knew what it meant and simply asked the question in order to get a discussion going. I do not think that merely asking what it meant is harassment in any way and no implication can be drawn from the mere inquiry.

But of course, according to the statement of Ms. Kempker-Cloyd, he went on and -- with more than that after she gave her rather graphic description of what it could be. I would call that a theoretical description, Mr. Shapiro, as you did in your brief, called it a rather graphic description. But then he went on, according to her, and said "Well, will you visit me in prison," which puts a different light on it, it seems to me.

The parking situation is a mystery to me. How much that becomes part of a sex discrimination case under the facts of this case, I still don't understand. Parking is, I believe, a term or condition of employment, and some status seems to be attached to parking spaces. However, it seems to me that parking spaces can be allocated to a number of criteria, and I'm not surprised that a new United States Attorney, especially one who has expressed his disgust with the government's way of doing things, which sounds like a typical American citizen to me, would look at something other than seniority in deciding how to allocate locate parking spaces.

There is no evidence in the record that Mr. Dettmer ever said to anyone, "If you don't have sex with me, I'm going to move your parking space." There is no evidence in the record that he linked this in any way to any kind of sexual harassment of anybody. It just simply occurred approximately five months or four months after there was a meeting. And then, of course the whole program didn't go through anyway.

And there is no evidence that the reallocation was going to be based on gender. As I understand it, the heads of the different sections could decide who was going to utilize their space. And, anyway, the whole thing blew over within a couple of months, and it was back to seniority system, which, of course, is the most understandable way and the least controversial way to allocate something, Because it deprives parking of its otherwise status. You just have been here longer.

It's like being the chief judge of this particular western district. I say to Judge Enslen jokingly, "Well, you know you're only chief judge because you were here longer than the rest of us. No one elected you because they liked you or they thought you were being the most competent." Don't put that in the newspaper. We do think that he is competent. I want the record to be very clear about that. But it's one of those things: You become chief judge because you have been here longer. And that's the government's way. It doesn't work that way in the state system, but that's the way the federal government works, Quite frankly, it's the best way to work, as far as I'm concerned, with the federal government.

Ms. Kempker-Cloyd lost her space to a demoted colleague with more seniority than her in April of 1994. When the United States Attorney's offices moved in May of 1995, she was next in the line for one of the new spaces that would open up at the new building. Mr. Dettmer began to consider changing the parking policy from an informal seniority-based to a formal merit-based assignment system for the new base spaces. The United States Attorney's of 4ce ultimately adopted a seniority-based system whereupon the plaintiff got her space.

Once again, nothing in the timing or other circumstances of a temporary policy change suggest a section based motive, except the bare fact that four women and one

man were next in line for the five spaces opening up, assuming that seniority had been used. I refer to plaintiff's Exhibit 47.

On the other hand, that doesn't look at the fact that some women may have taken over other aspects of the U.S. Attorney's job in supervisory positions that would have allocated the space to them. So I don't think that that's pare of this case.

What I have said up to now, except for the parking issue, which at this time probably has nothing to do with the case, has to be placed in the context of the plaintiff's other allegations in the case. The plaintiff does not allege the mere basic facts that I've outlined so far and others that I've not mentioned. It should be pointed out -- and the lawyers already know this -- that in ruling on this motion, I cannot make a determination about who is telling the truth. Ms. Kempker-Cloyd and Mr. Dettmer have different versions of events, and I have to accept Ms. Kempker-Cloyd's version of the facts. In addition, if one or more reasonable inferences or interpretations can be drawn from the facts, I must draw the conclusion that is most favorable to Ms. Kempker-Cloyd. It is up to the jury to make determinations regarding credibility and to draw reasonable inferences one way or the other.

Having said what I said so far, it seems to me, initially at least, that a couple of events, if they occurred, could take the plaintiff's allegations out of the realm of ordinary give and take that goes on in busy offices and give ordinary events an aspect that may cause them to rise to the level of harassment in employment discrimination.

First, the alleged physical threat by Mr. Dettmer to Ms. Kempker-Cloyd which occurred about April of 1994. Ms. Kempker-Cloyd presented evidence that Mr. Dettmer came to her office at a time when no one else was in the wing

of the building, stood in the doorway and said, "I have most of the people in the office afraid of me, . . You're not afraid of me, are you?"

Ms. Kempker-Cloyd said, "No."

He then said, according to her, "Well, I'll tell you what. I am bigger than you. I'm stronger than you. And I can take you any time." And then he said, "I 'm presidentially appointed. If you say anything, no one will believe you."

Ms. Kempker-Cloyd responded by getting into Mr. Dettmer face and saying, "You have to understand you're not going to do this. If you lay your hand on me again, I will see you dead. so you have to be prepared. You may think you are bigger. You may think you're stronger. But I'll be prepared to die. So you put that in the equation here."

In light of the alleged threat, I construe her statement as a warning that she would not submit to an attack readily -- or to any kind of assault readily -rather than as a death threat from her as a disgruntled employee. That's probably what other people will say if someone threatens them physically, it can be interpreted that way. I think a reasonable inference is that it can. Although when stated to Fran Ferguson, Ms. Ferguson laughed it off and Mr. Dettmer laughed, and that was the end of it. But, under the circumstances in this case, there was apparently a different interpretation. Anyone that is threatened -- each person raises the level of threat to the other side telling someone that threatens you that you're a mean dirty street fighter and you better watch out or you're a heavy-weight champion of the world, or whatever, in order to deflect that threat. I think that's all that is gin that particular case, giving -- casting the light in the light most favorable to the plaintiff in this case.

The incident also -- and maybe Mr. Dettmer didn't

mean this, but one of the definitions of "to take someone" is to copulate with someone. And perhaps that is the interpretation given to it by a reasonable person under the circumstances here. I'm not sure about that, but it could be -- taken in a light, once again a bright light, as most favorable to the plaintiff.

Then if you take that incident and the other incidents which might seem insignificant and not sexual, in and of themselves, as I •say, they take on a different cast or hue. Context being everything. In the context of this remark, a reasonable jury could interpret otherwise innocuous acts as continuing acts of sexual harassment sufficient to change Ms. Kempker-Cloyd's terms and conditions of employment. Let me draw a rough analogy. For example, it is perfectly legal for a person to walk down any public street in the State of Michigan. It is perfectly legal. It does not constitute discrimination for a person to walk behind a person of the opposite sex. It is perfectly legal to do it more than once. However, a point can be reached where this otherwise perfectly legal activity becomes stalking or harassment.

For example, if a man follows a woman on the sidewalk and says, "You had better watch out because one of these days I'm going to get you" and that man then follows the woman closely or follows her for several days in a row without even saying anything, the otherwise perfectly legal behavior can be construed to be stalking, which is a crime, or given its civil context, if it were an employment relationship, sexual harassment.

So that's where I'm coming from on that particular issue.

I find that there would be sufficient evidence to go to the jury as far as the harassment goes up until December, 1994 and then that the event that occurred on the stairwell in

May of 1995 also gives rise to a potential claim, considering -- taking that statement again and the Greek sex thing and "Will you visit me in jail" after that statement could .even cast, it seems to me, a light on the ever4t that occurred in May of 1995 to include that as part of the same sexual harassment that occurred in 1994.

As I said context being everything, and these threats if made being pretty serious as Mr. Green is the first to acknowledge. He was the first to acknowledge it, because he was the first person to stand up. He denied that it happened, but it could be pretty serious. And even if, it seems to me, there is another incident that occurs three or four months later after a threat like that -- take the stalking thing, "You better watch out because one of these days I'm going to get you," and that person walks behind you again four or five months later, a fear caused by the initial statement could be resurrected four or five months later.

Regarding retaliation, there are two aspects to the ret4liation claim. First, Mr. Dettmer's alleged attempts to get Ms. Kempker-Cloyd fired, together with not giving her a commendation, together with the investigation that was followed through by the Inspector General's Office, Department of Justice, and the allegations of vandalism, surveillance and phone messages.

Taking the vandalism first, there is no reliable evidence in the regard that Mr. Dettmer was in any way responsible for this activity, assuming that the observations of plaintiff and her witnesses are correct. Rule 56 requires that the Court consider only admissible evidence in ruling on a motion for summary judgment. At this point, I believe that the evidence submitted by plaintiff is speculative, conclusory and unduly prejudicial to 4efendant and should not be considered in my ruling. Assuming, as I said, that the activities did happen, there is no linkage to Mr. Dettmer.

I will take another look at the coffee cup incident. I want an opportunity to review the record on that. But my recollection of it is that it's very similar to the others, and there is no linkage even for that to Mr. Dettmer. But I'll take a look at it.

I might say this later, but even regarding evidentiary matters, I don't think there can be any evidence submitted regarding this type of activity in this case, because even if it goes in, the jury, in my judgment, would believe that somehow I'm giving my imprinture to the credibility of that evidence. So if there is other evidence that can link Mr. Dettmer to these activities, I'm glad to look at it. So it's not a final ruling. But it seems to me it has to be at trial supported by more than the mere conjecture that we have at this time.

As to the attempts to get plaintiff fired, I believe that even if a person is not fired, consistent attempts can alter one's employment status even though the threat is not carried out. The Ellerth case, I think, was on that point in the Supreme Court recently. Although it wasn't a threat to fire, it was a promise of promotion or a discussion of promotion. I think that the law still is that an employer cannot retaliate against a person who makes even an unwarranted charge of discrimination. The reason that there can be no retaliation is that that would have a chilling effect upon people's filing these charges, and thus delay the Congressional purpose of eliminating sexual discrimination from the work place.

The counter argument is that an unscrupulous employee can seek to control the employer and the work environment by making false charges of discharge. To bring it home, I didn't get the parking place or the promotion or whatever bec4use of my sex or because I would not give in to sexual demands.

Congress has already made the policy choice regarding these twp countervailing arguments. On the other hand, the mere filing of a charge does not inoculate an employee from all disciplinary actions that an employer could impose.

Just a personal note: I tried an early retaliation case, Judge Gibson's first case many, many years ago. And I don't think the law has changed from then to what it is now. There is no inoculation, but you can't retaliate because of the charge.

Regarding that retaliation charge, I'm going to review the record and get back to the parties as to whether that claim still stands after this motion for summary judgment and pursuant to Federal Rule 56 (d).

None of what I said up to now addresses the defendant's argument regarding the statute of limitations and the plaintiff's argument of continuing violation. I must admit that this argument of continuing violation is difficult. I read some articles on it. Courts of appeals articulate it differently. Sometimes it's difficult to see what's overarching or what's not overarching. I think I've already said that the crowding incident under the circumstances and the following incident and the comment can be linked to the other matters. Therefore, the statute of limitations hasn't run totally.

The issue in front of me is the one similar to one I faced in a promotion case and similar to the one I think was faced by the Seventh Circuit in the Galloway case. And that is: How much can the plaintiff recover regarding damages?

As I understand it, there are two categories of continuing violation: First, repeated occurrences of the same illegal act and, second, a serial violation which consists of a number of discriminatory acts emanating from the same

discriminatory animus. It seems to me that we're talking about the second type of continuing conduct in this case -- a number of discriminatory acts emanating from the same discriminatory animus.

I think I'm right about that, aren't I, Mr. Shapiro and Mr. Green?

MR. GREEN: Yes, Your Honor.

MR. SHAPIRO: Yes, Your Honor.

THE COURT: All right.

Although a statue of limitations defense often is a quick and complete knockout defense in many situations, sometimes it may also require factual determinations after the evidence is analyzed by the trier-of-fact. The problem with a determination of sexual harassment, itself, is a cumulative event, especially in a case like this, as I've already described. One act may be the first move in a harassment situation -- asking a person for a date, for example -- but that would not be sexual harassment itself. However, if a person became persistent, going to the victim's house at all hours of the evening -- which did not occur here -- or following the person with persistent requests, in retrospect the initial request can be interpreted as the first incident of harassing conduct. I think the standard for determining when the statute starts to run is to determine which event should have alerted the average lay person to protect her rights.

The only act that plaintiff alleges that occurred within the statutory period, taking the best light on it in this case, is the crowding in the stairwell incident. I'll tell you what. I'm going to reserve the whole thing on continuing violations here, even the stairwell incident. want to take another look at that. And I will prepare an order which will encapsulate these

findings and leave on the table -- my table, that is -- the issue of continuing violation.

In other words, I 'ye gone about as far as I can, I think, regarding the motion in front of me. And it doesn't totally resolve it, except that I have found -- just to summarize -- that the acts that occurred in 1994, considered in total and in context, can be found by a reasonable trier-of-fact to have constituted sexual harassment. I tend to believe that the -- and this will come in a final order one way or the other -- that the May 1995 incident can be linked to that. Sometimes I think about that, and I'm not quite so sure any more. People wonder what I do for a living. And this is what I do, I guess. This is not the easy part. And I'll get back to you on that.

The parking -- it seems to me there is no genuine issue of material fact on the parking. There is no genuine issue of material fact regarding the vandalism and those types of things, and the order will include that.

In addition, I am concerned that the case remains focused on matters that are relevant and not unduly prejudicial under Rule 403. I've already expressed my opinion on the retaliation evidence regarding surveillance, vandalism, et cetera.

I have reservations about other matters that the plaintiff is apparently seeking to introduce into evidence. And let me name some of those so you people can start thinking about them:

First, evidence that other employees of the United States Attorney's office felt uncomfortable with Mr. Dettmer. What does that mean? I don't have a clue. And I